# APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED DECEMBER 1, 2000

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 00-1009

Carol Clune; Paul L. Clune; Kelly M. Clune,

Plaintiffs-Appellants,

v.

Alimak AB; Alimak Elevator Company;

Defendants,

Industrivarden Service AB,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: September 12, 2000

Filed: December 1, 2000

Before WOLLMAN, Chief Judge, LAY and BRIGHT, Circuit Judges.

LAY, Circuit Judge.

*Appendix A*

In February 1996, Joseph Clune was working at a construction site in Kansas City, Missouri, for his employer, J.E. Dunn, when he fell from a construction hoist through an unenclosed area on top of the work platform.[1] He died as a result of the fall. The hoist was manufactured by Linden-Alimak AB, a Swedish corporation that designed and manufactured construction hoists and other lifts. Industrivarden Service AB ("Industrivarden") is one of two successor companies of Alimak AB. Industrivarden is a shell corporation that has no employees and does not manufacture or sell equipment. For purposes of this suit, the company exists to handle the liabilities of Linden-Alimak AB/Alimak AB. Linden-Alimak AB sold the hoist F.O.B. Swedish port to Esco Corporation ("Esco") in 1972. At the time, Esco maintained an office in Oregon and imported the hoist into the United States via Seattle, Washington.

Carol Clune, Paul Clune, and Kelly Clune ("the Clunes"), the wife and children of the decedent, brought a wrongful death suit against Industrivarden. The district court granted Industrivarden's motion to dismiss for lack of personal jurisdiction. On appeal, the Clunes argue that the exercise of personal jurisdiction in this case falls under the Missouri long-arm statute and comports with the Due Process Clause of the Fourteenth Amendment. The district court held that Industrivarden, a Swedish corporation, did not have sufficient minimum contacts with Missouri during the relevant time period to satisfy constitutional personal jurisdiction standards.

We reverse.

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1. A construction hoist is a temporary elevator-like structure used by workers during the construction of buildings.

## *Appendix A*

### *A.*

During the years Linden-Alimak AB/Alimak AB[2] was in business, it used distributors within the United States to sell its products in the United States. From approximately 1960 to 1970, B.M. Heede ("Heede"), a Connecticut corporation, was the exclusive distributor for Linden-Alimak AB. From 1970 to 1974, the company used two distributors for its product: Oregon-based Esco sold the hoists in thirteen western states, while Heede sold the equipment in the rest of the country, including Missouri. Both distributors also sold other manufacturers' products.[3]

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2. Herein, "Linden-Alimak AB/Alimak AB" refers to the company as it existed before it was sold in 1988. It does not include the "new" Alimak AB. Alimak AB originated in Sweden as a manufacturer of construction equipment. Through a corporate merger in 1968, the company became Linden-Alimak AB and took on business in crane manufacturing. Then in 1983, Linden-Alimak AB dropped its crane manufacturing business and the name "Linden," and became Alimak AB once again. Five years later, the company was sold in two parts. The Alimak name and most of its assets were sold to a company, which continues to manufacture and sell under the Alimak name today. This "new" Alimak AB, as it is referred to by the parties, is not involved in this lawsuit. The liabilities and some of the assets of the "old" Alimak AB were sold to Alivator AB. In 1995, Alivator AB dissolved and merged into a Swedish company called Industrivarden Service AB.

3. In 1974, Linden-Alimak AB terminated its relationship with Esco, bought a portion of Heede and made Heede its sole distributor in the United States. By 1978, Linden-Alimak AB owned all of Heede, and changed Heede's name to Linden-Alimak, Inc.

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When Linden-Alimak AB became Alimak AB in 1983, its American subsidiary followed suit and became Alimak, Inc.[4] Alimak, Inc. continued to be the exclusive United States distributor for its Swedish parent.[5] As a result of its relationships with these distributors, approximately 700 of Linden-Alimak AB/Alimak AB's construction hoists were sold in the United States by 1986. Between twenty and forty of those hoists were sold in Missouri.

The district court found that Industrivarden was not subject to personal jurisdiction in Missouri because the company's activities were not sufficiently targeted to that state. First, the court denied jurisdiction on the stream of commerce theory, finding that Linden-Alimak AB/Alimak AB did not purposefully avail itself of the privilege of conducting business in Missouri. Second, the court failed to

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4. Linden-Alimak AB/Alimak AB and Alimak, Inc. were distinct, yet connected, companies. On one hand, Alimak, Inc. maintained its own books, paid employees through its own payroll, provided its own policies, rules and regulations, and paid for its Swedish parent's products when it purchased F.O.B. Swedish port. On the other hand, Linden-Alimak AB/Alimak AB relied solely on its subsidiary for sales in the United States and provided sales brochures with which to promote its products. Management of Alimak, Inc. went to Sweden to discuss with the parent company issues such as improvement, product support, and anticipated sales. Alimak AB also sent Swedish employees to the United States to train Alimak, Inc. service technicians.

5. From this point forward "Alimak, Inc." includes its predecessor, Linden-Alimak, Inc., and refers to the company as it existed until 1988, when its assets and liabilities were sold to separate companies.

find jurisdiction over Linden-Alimak AB/Alimak AB based on the activities of its subsidiary, Alimak, Inc. Because it did not find sufficient minimum contacts, the district court did not consider whether exercising personal jurisdiction would comport with fair play and substantial justice under the Due Process Clause.

We review a dismissal for lack of personal jurisdiction de novo. *See Stevens v. Red Wing*, 146 F.3d 538, 543 (8th Cir. 1998). To successfully challenge a dismissal for lack of personal jurisdiction, the plaintiff must make a prima facie showing that jurisdiction is proper. *See id.*

We apply a two-part test to the jurisdictional issue. First, whether the forum state's long-arm statute is satisfied, and second, whether the exercise of jurisdiction comports with due process. *See id.*

***B.***

The Missouri long-arm statute confers jurisdiction over nonresidents who commit tortious acts within the state. *See* Mo. Rev. Stat. § 506.500.1(3) (2000 Supp.). The Missouri Supreme Court has declared that when the Missouri legislature enacted the long-arm statute, its "ultimate objective was to extend the jurisdiction of the courts of this state over nonresident defendants to that extent permissible under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States." *State v. Pinnell*, 454 S.W.2d 889, 892 (Mo.1970) (en banc). Accordingly, Missouri courts have interpreted the statute broadly to cover those cases where the Due Process Clause permits the

assertion of personal jurisdiction. *See State v. Wiesman*, 627 S.W.2d 874, 876 (Mo.1982) (en banc) (citations omitted). Thus, the critical factor in our analysis is whether the exercise of personal jurisdiction in this case comports with due process.

The Due Process Clause establishes the parameters of a state's power to assert personal jurisdiction over a nonresident defendant. *See Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984). Due process requires that the defendant "have certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1941)). The Supreme Court has rejected "talismanic" formulas to personal jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985). Rather, we must carefully consider the facts of each case to assess the nature of the contacts between the defendant and the forum state. *See id.* at 486. The factors we weigh include:

> the burden on the defendant, the interests of the forum state in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.

*Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 374 (8th Cir. 1990) (citing *Asahi Metal Indust. Co. v.*

*Superior Court*, 480 U.S. 102, 113 (1987) (part II.B., joined by eight Justices)). *See also Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977) (reciting factors to consider in determining whether due process is satisfied: nature and quality of defendant's contacts with the forum state; quantity of contacts; relation of the cause of action to those contacts; interest of the forum state in providing a forum for its residents; and convenience of the parties).

The baseline for minimum contacts is "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The defendant's contact with the forum state must be such that he or she "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). In *World-Wide Volkswagen* the Supreme Court recognized that

> if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

*Id.* In other words, personal jurisdiction may be exercised consonant with due process "over a corporation that delivers

its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98.

In its most recent discourse on the stream of commerce theory, the Court in *Asahi* debated whether a foreign manufacturer that places a product in the stream of commerce purposefully avails itself of the privilege of conducting business in a state where the product ultimately is found. Although a majority of the *Asahi* Court agreed with Justice O'Connor that jurisdiction was not proper in that case, five Justices refused to adopt her articulation of a stream of commerce "plus" theory.[6] *See* 480 U.S. at 116-22. *See also Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 614 ("In short, *Asahi* stands for no more than that it is unreasonable to adjudicate third-party litigation between two foreign companies in this country absent consent by the nonresident defendant.").

In the present case, Linden-Alimak AB/Alimak AB did more than simply set a product adrift in the international stream of commerce. The record shows Linden-Alimak AB/ Alimak AB created the distribution system that brought the hoist to Missouri. In *Barone*, we endorsed the idea that when a seller heads a distribution network it realizes "the much greater economic benefit of multiple sales in distant forums," which in turn "may 'satisfy the purposeful availment test.' " 25 F.3d at 613 (quoting *Giotis v. Apollo of the Ozarks, Inc.*,

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6. Justice O'Connor opined that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112.

800 F.2d 660, 667 (7th Cir. 1986)). Barone was an American employee who was injured by a fireworks display and brought an action against the Japanese manufacturer of the fireworks. Although the manufacturer had no office, agent, or distributor in Nebraska, did not advertise in Nebraska and did not send any of its products into Nebraska, it was subject to personal jurisdiction based on the process by which its products arrived in that state. During the relevant time period, the manufacturer used nine distributors in six states. Despite the manufacturer's claim that it had no actual knowledge that one of its distributors sold products in Nebraska, "such ignorance defie[d] reason and could aptly be labeled as 'willful.' " *Id.* at 613. Its strategic choice of distributors that could reach much of the country was evidence of the manufacturer's efforts "to place its products in the stream of commerce throughout the Midwest and other parts of the country as well." *Id.* at 614. Because it was difficult to imagine that this effective distribution system was put in place by chance, the manufacturer could not plead ignorance that its products were being distributed into neighboring states. *See id.* at 613-14. When a foreign manufacturer reaps the benefits of a distribution network in this way, "it is only reasonable and just that it should . . . be held accountable in the forum of the plaintiff's choice . . . ." *Id.* at 615.

Recently we applied the rule of *Barone* in *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir. 1998), where a worker who was injured in a grain dust explosion in Iowa brought a products liability action against the British manufacturer of a safety device used in the grain elevator. Although the manufacturer in *Vandelune* had no office, agent, employee, property, or advertising or

solicitation campaigns in Iowa, we found that the lack of a direct marketing presence did not necessarily mean that the manufacturer had not purposefully marketed its product in that state. *See id.* at 948. The following facts led to the conclusion that there were sufficient contacts to support jurisdiction in that case: (1) the appellee designed the product at issue for the United States market; (2) the appellee agreed to distribute its product through affiliates located in the United States; (3) the appellee put its logo and identifying decals on the product; (4) the appellee directly shipped some of its products to a distributor in nearby Illinois; (5) the appellee's employees attended technical support meetings at the distributor's Illinois facilities; and (6) the appellee sold 619 units to an Illinois distributor, 81 of which were resold in Iowa. *See id.*

The facts alleged by the Clunes are similar to those in *Vandelune*. Linden-Alimak AB/Alimak AB designed its construction hoists for the United States market. The company had exclusive distribution agreements with United States distributors.[7] The Swedish parent's logo was displayed on products that were sold in the United States. Linden-Alimak AB/Alimak AB also conducted training seminars in the United States for technicians employed by Alimak, Inc. who serviced hoists that were sold by the subsidiary. Of the 700 construction hoists that were sold in the United States

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7. It is worth nothing that the only way a customer in the United States could acquire a Linden-Alimak AB/Alimak AB construction hoist was through the company's exclusive United States distributor. If a customer directly contacted Linden-Alimak AB/Alimak AB, the parent would refer that customer to Alimak, Inc. in the United States.

by the company's distributors, between twenty and forty ended up in Missouri. This fact alone makes it difficult for us to characterize the hoist's location in Missouri as random, attenuated or fortuitous. *See Burger King*, 471 U.S. at 475. Additionally, the Swedish parent provided sales brochures and instruction manuals to its distributors for use in promoting and servicing its products in the United States. Members of the Swedish parent's board of directors also served as directors of its subsidiary. Any of these facts, taken alone, might fall short of purposeful availment, however, when taken together they show that Linden-Alimak AB/ Alimak AB engaged in a series of activities that were designed to generate profits to the parent from its subsidiaries' sales across the United States.[8]

The district court concluded that Industrivarden could not be subject to personal jurisdiction under *Vandelune*

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8. Industrivarden insists that any contacts its predecessor companies had with Missouri were outside of the time period that is material to the issue of personal jurisdiction. Industrivarden cites a string of cases to support its assertion that minimum contacts must occur at the time the cause of action arose, the time the suit is filed, or a reasonable period of time immediately prior to the filing of the lawsuit. *See* Brief for Appellee at 15-16. According to Industrivarden, the contacts alleged by the Clunes occurred before 1988, which is outside of the window of personal jurisdiction opportunity for the 1996 incident that gave rise to this case. Although Industrivarden is correct in its statement of the chronological rule, its conclusion cannot stand. Linden-Alimak AB/Alimak AB was "present" in Missouri from the time the crane entered Missouri until the time that product ceased to exist in that state. Because the crane must have been present at the time Joseph Clune fell from it, the timing of the contacts was proper for personal jurisdiction purposes.

because Linden-Alimak AB/Alimak AB did not send its product "into a regional distributor with the expectation that the distributor [would] penetrate a discrete, multi-State trade area." 148 F.3d at 948. Although we can imagine a case where a foreign manufacturer selects discrete regional distributors for the purpose of penetrating the markets in some states to the exclusion of others, that situation is not before us. The record shows that Linden-Alimak AB/Alimak AB did not seek to limit the states or regions where their construction hoists would be sold. Rather, it utilized distributors that had sales territories across the United States. A foreign manufacturer that successfully employs a number of regional distributors to cover the United States intends to reap the benefits of sales in every state where the distributors market. Similarly, a foreign manufacturer that successfully employs one or two distributors to cover the United States intends to reap the benefit of sales in every state where those distributors market. The difference is one of form, not function, and the practical effect is the same.

We are not persuaded by Industrivarden's argument that it was unaware of what happened to its products after they left Swedish port. "[S]uch ignorance defies reason and could aptly be described as 'willful.' " *Barone*, 25 F.3d at 613. *See also id.* at 613 n.4 (explaining how the distinction between what the defendant knew and should have known is immaterial to the personal jurisdiction analysis). If we were to conclude that despite its distribution system, Linden-Alimak AB/Alimak AB did not intend its products to flow into Missouri, we would be bound to the conclusion that the company did not intend its products to flow into *any* of the United States.

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The facts show that Linden-Alimak AB/Alimak AB purposefully directed its products to the United States through the distribution system it set up in this country. The company knew that by virtue of this system, its construction hoists entered the Missouri and other Midwest markets. Linden-Alimak AB/Alimak AB's creation of the system that brought hoists to Missouri established sufficient minimum contacts with that forum to satisfy the due process standards set by the Supreme Court and followed by this circuit.[9]

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9. Industrivarden asserts that the present case comports with post-*Asahi* Eighth Circuit decisions where we have denied jurisdiction over foreign defendants. We disagree.

In *Gould v. P.T. Krakatau Steel*, 957 F.2d 573 (8th Cir. 1992), an Indonesian-based defendant entered into a sales contract with a United States distributor, F.O.B. Indonesia. The distributor accepted delivery of the products in Indonesia, transported the products to the United States, and sent a portion of the products to the plaintiff's employer in Arkansas. *See id.* at 575. The plaintiff later was injured while unpacking the products. *See id.* In affirming the dismissal by the district court, we found insufficient contacts based on a number of factors, including that the defendant was not licensed to do business in Arkansas, did not have any office, agent, property, bank accounts, or operations in the state, and did not advertise or solicit any business there. *See id.* at 576.

As an initial matter, *Gould* involved a commercial dispute between merchants, which is distinct from the Clune's personal injury claim against Industrivarden. *See Guinness Import Co. v. Mark VII Distributors, Inc.*, 153 F.3d 607, 615 n.7 (8th Cir. 1998) (noting the incongruity between personal injury claims and commercial disputes). More importantly, *Gould* involved a limited transaction in the international marketplace. *See* 957 F.2d at 576. That fact sharply contrasts with the record in the present case, which contains

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With minimum contacts satisfied, we must next balance those contacts with the burden on Industrivarden of defending

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evidence of continuous transactions between Linden-Alimak AB/ Alimak AB and its United States distributors.

In *Falkirk*, 906 F.2d 369 (8th Cir. 1990), a workman in North Dakota was injured while using a defective cam manufactured by the defendant, a foreign company. This court held personal jurisdiction over the alien corporation was precluded by insufficient contacts. *See id.* at 376. The foreign manufacturer's officials never visited North Dakota to inspect the site where the defective cam was installed and it did not negotiate the contract of sale or discuss design specifications with the plaintiff. *See id.* at 375. There was no evidence that the manufacturer had any knowledge it was manufacturing cams that were to be installed in North Dakota. *See id.* Accordingly, we determined that the manufacturer "did nothing more than place its products in the stream of commerce," and concluded that the interest of the plaintiff was best vindicated by an action against the importer, which was the party with whom the manufacturer shared a direct contractual relationship. *See id.* at 376.

Linden-Alimak AB/Alimak AB's activities cannot be characterized as amounting to "nothing more than place its products in the stream of commerce." *Falkirk*, 906 F.2d at 376. Contrary to the defendant in *Falkirk*, who was totally without information about the ultimate destination of its product, Linden-Alimak AB/Alimak AB, at minimum, had constructive knowledge that its construction hoists would end up in Missouri. The parent knew that by 1986, 20 to 40 hoists were sold into the state. Also, the intermingling of directors and officers between Linden-Alimak AB/Alimak AB and Alimak, Inc. suggests that the parent was aware of its subsidiary's activities. *See e.g.*, *Iota Management Corp. v. Boulevard Investment Co.*, 731 S.W.2d 399, 410 (Mo. App. 1987) (corporation is charged with knowledge of its officers and agents).

itself in Missouri, the interest of Missouri in adjudicating the dispute, the Clunes' interest in obtaining the most efficient resolution of this matter, the judicial system's interest in obtaining the most efficient resolution of this matter, and the shared interest of the several states in furthering fundamental substantive social policies. *See Falkirk*, 906 F.2d at 369.

The Supreme Court has noted that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *See Asahi*, 480 U.S. at 114 (part II.B., joined by eight Justices). As we have noted, Industrivarden is a shell corporation that has no employees or products to sell. Essentially, the company exists through its insurance company. The overwhelming majority of the evidence in this case will be found in Missouri or the surrounding area, such as the construction hoist, eyewitnesses, medical records, and documents material to the incident. As a result, Industrivarden would have to come to Missouri to investigate and gather evidence no matter where a trial were to take place. With the help of modern technology and transportation, Industrivarden easily will be able to collect any relevant documents that are in Sweden and transport them to the United States. For these reasons, any burden Industrivarden might undertake in defending itself in Missouri will be minimal.

It is readily apparent that Missouri has the strongest interest of any forum in adjudicating this dispute. The accident that gave rise to this case occurred in Missouri.

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Joseph Clune was an employee of the Missouri company, he worked and paid taxes in that state, and his death occurred there as a result of a product sold in that forum. No other state has a more compelling connection to this case.

The Clunes' interest in obtaining convenient and effective relief is best satisfied by adjudicating this dispute in Missouri. Although they are residents of Kansas, Kansas is not a viable venue for this case and Missouri is the closest choice. In any event, Missouri is abundantly more convenient for the Clunes than if this case were to be tried in Sweden. Our decision today in no way guarantees the Clunes success in this suit. However, it likely would be impossible for this family of three who has lost their husband and father to travel abroad to seek restitution for his death.

Trying this case in Missouri federal court also satisfies the judicial system's interest in obtaining the most efficient resolution of this controversy. We exercise caution when subjecting a foreign corporation to jurisdiction in the United States, but are satisfied that Linden-Alimak AB/Alimak AB affirmatively took on the risk of liabilities here.

Finally, the adjudication of this dispute in Missouri ensures the fundamental social policy of safety in goods that enter our marketplace. As commercial borders are dismantled in the increasingly global marketplace, more products are available to consumers in the United States. It is essential that our laws designed to protect the health and safety of human beings not be lost in this flurry of commerce.

The judgment of dismissal by the district court is vacated and the cause is remanded for further proceedings.

BRIGHT, Circuit Judge, concurring.

I concur in the result only.

I do not agree with the stream of commerce theory of the majority. Initially the Swedish manufacturer, Linden-Alimak AB, shipped the construction hoist F.O.B. Swedish port to the Pacific Northwest in the United States. The hoist apparently came into Missouri via a contractor. The application of the stream of commerce theory would subject a foreign entity to suit in any state of the Union where the product ended up, regardless of the original destination for the article or how the particular product happened to be in a particular place in any state.

I believe, however, that the defendant through its subsidiaries was subject to jurisdiction because those subsidiaries were doing business in Missouri. Its subsidiaries, Linden-Alimak Inc. and Alimak Inc., were incorporated in the State of Connecticut. They both held certificates of authority to conduct business in the State of Missouri. They employed sales representatives to cover multi-state territories. These sales representatives sold their companies' products in Missouri.

Courts in the Eighth Circuit have held that they can only assert personal jurisdiction over a foreign parent corporation based on the activities of its resident subsidiary when the parent corporation dominates and controls the subsidiary to the point that the two companies no longer maintain corporate formalities. *See Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc.*, 519 F.2d 634, 638 (8th Cir. 1975).

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The district court in the instant case found that the Clunes have not produced any evidence to show that Industrivarden controlled, or had any influence over, its distributors' and subsidiaries' marketing and sales decisions. The district court also noted that the Clunes failed to show that the distributors and subsidiaries were selling in Missouri under the expectations of Industrivarden. Therefore, the district court refused to base jurisdiction over Industrivarden on the activities of its distributors and subsidiaries.

The district court ignored evidence that suggests that Industrivarden exercised control over its subsidiaries' marketing and sales decisions. Industrivarden produced sales brochures which were distributed to residents and consumers in Missouri by its distributors and subsidiaries. At least three members of the subsidiary's board of directors were also directors of the foreign manufacturer. Pursuant to Missouri law, Mo. Rev. Stat. § 351.310 (1986), these directors of the subsidiary "controlled and managed" the business of the subsidiary. These directors made no effort to exclude Missouri from its United States sales. At least two of the directors of the subsidiary were also officers of the foreign manufacturer. Courts have found that [illegible] be an important factor in determining whether there are [illegible]fficient minimum contacts. *See Hawes v. Honda Motor Co., Ltd.*, 738 F.Supp. 1247, 1251 (E.D. Ark. 1990). Under Missouri law, a corporation is charged with the knowledge of its officers and agents. *Iota Mgmt. Corp. v. Boulevard Inv. Co.*, 731 S.W.2d 399, 410 (Mo. App. 1987). Consequently, the foreign manufacturer had knowledge, through its officers and directors, of all of its subsidiary's contacts, sales, and marketing.

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Because of the absence of evidence regarding the issue, I do not here hold that the foreign manufacturer and its subsidiaries are so tightly related that the subsidiaries are mere alter-egos of the parent. Rather, I simply refer to the relationship to support our conclusion that without the existence of its subsidiaries, Industrivarden would not be able to distribute its product in the United States. This connection between the foreign manufacturer and the resident subsidiary represents more than simply placing a product into the stream of commerce.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED DECEMBER 3, 1999

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION**

No. 98-0179-CV-W-1

CAROL CLUNE, et al.,

Plaintiffs,

v.

INDUSTRIVARDEN SERVICE AB,

Defendant.

**ORDER**

On October 27, 1999, the Court held that it could not exercise personal jurisdiction over Defendant Industrivarden Service AB, a Swedish corporation that has never, itself or through its predecessor corporations, sold products in Missouri, marketed in Missouri, serviced products in Missouri, directed advertising toward Missouri, or used distributors targeted toward penetrating the Missouri market. *See* Order at 10-13 (October 27, 1999). Plaintiffs Carol Clune, Paul Clune, and Kelly Clune ("the Clunes") understandably disagree with the Court's Order. They have moved the Court to alter, amend, or reconsider its Judgment,

or, alternatively, to vacate the Judgment to allow them time for further discovery on the jurisdictional issue. The Clunes have also requested the Court hold a hearing on their motion.

The Court has carefully considered the facts and reasoning cited by the Clunes in support of their argument that the Court's Judgment is flawed. The Clunes apparently believe that this Court should overlook Supreme Court decisions since 1980 that have clarified the law with respect to exercising personal jurisdiction based on a foreign manufacturer's placement of its products in the international "stream of commerce".[1] The Court declines to ignore controlling Supreme Court precedent.

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1. The Supreme Court has limited the overbroad application of the stream of commerce theory since *Benn v. Linden Crane Co.*, 326 F. Supp. 995, 996 (E.D. Pa. 1971) ("Linden-Alimak manufactured and sold a crane f.o.b. Swedish port to a purchaser that had exclusive control over shipment . . . to the U.S. Linden-Alimak had reason to know that the crane would be resold for ultimate use and operation in the U.S. . . . I find that Linden-Alimak was 'doing business' [in Pennsylvania]."), and *Boykin v. AB Lindenkraner*, 252 So. 2d 467, 469 (La. Ct. App. 1971) ("The manufacturer here is aware that the independent intermediary Heede sells its cranes for use in the U.S. The only reasonable conclusion is that the manufacturer intends that its cranes shall be sold for use in the U.S., including every state in which the [distributor's] efforts may produce the desired results."). *See World Wide Volkswagen v. Woodson*, 444 U.S. 286, 297-98, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980) ("But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State; . . . the mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with

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Additionally, the Clunes would have this Court ignore the Eighth Circuit's careful distinction between cases where a foreign manufacturer merely places its products into the national or international stream of commerce and cases where the manufacturer "pours its products into a regional distributor with the expectation that the distributor will penetrate a discrete, multi-State trade area." In the former situation, which exists in the instant case, controlling law dictates that the manufacturer's contacts with the forum state are "attenuated, random, or fortuitous" and forum state courts cannot exercise personal jurisdiction over the manufacturer. *See* Order at 11 (October 27, 1999); *Asahi*, 480 U.S. at 109, 107 S. Ct. at 1030; *Gould v. P.T. Krakatau Steel*, 957 F.2d 573, 576 (8th Cir.), *cert. denied*, 506 U.S. 908, 113 S. Ct. 304, 121 L. Ed. 2d 227 (1992). In the latter situation, which existed in *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943, 948 (8th Cir. 1998) and *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994), the manufacturer is deemed to have purposefully

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the forum State.") (internal quotations and citations omitted); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76, 105 S. Ct. 2174, 2184, 85 L. Ed. 2d 528 (1985) ("This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person.") (internal quotations and citations omitted); *Asahi Metal Indus. Co. v. Superior Ct. of Calif.*, 480 U.S. 102, 109, 107 S. Ct. 1026, 1030, 94 L. Ed. 2d 92 (1987) ("A defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state.").

availed itself of the laws of the forum state. The Court finds itself bound by the distinction clearly set forth in this controlling case law.

In summary, the Court finds no legally sound reason why it should alter or amend its Judgment in this case. Neither a hearing nor further discovery will alter the controlling precedent and legal reasoning with which the Clunes disagree. Accordingly, the Clunes' motions are DENIED.

IT IS SO ORDERED.

s/ Dean Whipple
Dean Whipple
United States District Court

Date Dec. 3, 1999

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED OCTOBER 27, 1999

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

No. 98-0179-CV-W-1

CAROL CLUNE, et al.,

Plaintiffs,

v.

INDUSTRIVARDEN SERVICE AB,

Defendant.

### ORDER

Plaintiffs Carol Clune, Paul Clune, and Kelly Clune ("the Clunes") have sued Defendant Industrivarden Service AB ("Industrivarden") to recover damages for the death of their husband and father, Joseph Clune, who fell from a construction hoist manufactured by Industrivarden's predecessor corporation. Industrivarden has moved the Court for an Order dismissing the case against it for lack of personal jurisdiction [Does. # 5, 6]. The Clunes have moved for an extension of time to respond [Doc. # 32], and, in conjunction with their now-filed response, for leave to exceed the page limitation of Local Rule 7.1(f) [Doc # 34]. Industrivarden

has filed its reply brief with a similar motion for leave to exceed the page limit [Doc. # 36]. The Clunes have objected to Industrivarden's motion; they have requested an additional fifteen surreply pages if the Court grants Industrivarden's motion to exceed the page limit in its reply brief [Doc. # 39]. The Clunes have also moved for leave to amend their complaint [Doc. #31].

The Clunes' motion for an extension of time, to which Industrivarden consented, is GRANTED for good cause. The Court also GRANTS the Clunes' and Industrivarden's motions to exceed the page limit in the Clunes' suggestions in opposition and Industrivarden's reply. The Court DENIES the Clunes' motion for leave to file a surreply brief. The Court finds that the length of the parties' arguments only detracts from their merits. For the following reasons, Industrivarden's motion to dismiss for lack of personal jurisdiction is GRANTED and the Clunes' motion to amend is MOOT.

## I. INDUSTRIVARDEN'S MOTION TO DISMISS

### A. Factual Background

#### *1. The Accident and The Elevator.*

The Clunes are residents of Kansas. Their husband and father, Joseph Clune, died in downtown Kansas City, Missouri when he fell from an elevator at a construction site in February 1996. Joseph Clune was working on the construction site for his employer, J.E. Dunn, when the accident occurred. The elevator, otherwise known as a

construction hoist, was manufactured by Linden-Alimak AB, a Swedish corporation. In 1972, Linden-Alimak AB sold the elevator F.O.B. Swedish port to Esco Corporation ("Esco"). At that time, Esco maintained an office in Oregon. Esco exported the elevator out of Sweden and imported it into the United States via Seattle, Washington. The parties have not and purportedly cannot show who or what entities owned and operated the elevator between its importation by Esco in 1972 and Joseph Clune's accident.[1]

***2. Linden-Alimak AB and Its Successor Corporations.***

Linden-Alimak AB was, for all purposes relevant to this case, incorporated in Sweden in 1947. Industrivarden, a completely separate corporation, was incorporated in Sweden in 1986. In 1984, Linden-Alimak AB dropped its crane manufacturing business and the name "Linden." The company became Alimak AB. In 1987, a separate company purchased the Alimak AB name and most of its assets. "Alimak AB" still exists today, but the company that operates

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1. While the Clunes' contend that J.E. Dunn, Joseph Clune's employer, purchased the elevator from Remco Rental Machinery Company, a company located in Overland Park, Kansas, this contention is based on inadmissible hearsay contained in the deposition testimony of Ulf Uno Lundell. *See* Plaintiffs Exhibit B, Lundell Deposition at 128-131. Evidence presented to oppose a motion to dismiss or motion for summary judgment must be admissible. *See e.g. American Airlines, Inc. v. KLM Royal Dutch Airlines, Inc.*, 114 F.3d 108, 110-11 (8th Cir. 1997) (summary judgment); *Encore Productions, Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1115 (D. Colo. 1999) (motion to dismiss for lack of personal jurisdiction). Even if admissible, however, this evidence does not help establish Industrivarden's contacts with Missouri.

under that name is not currently involved in this lawsuit. The liabilities (and some of the assets) of the old Alimak AB (1984-1987) were assumed by a company called Alivator AB in 1987. In 1995, Alivator AB was merged into Industrivarden. To avoid confusing the existing Alimak AB, which is not involved in this suit, with the old Alimak AB (1984-1987), which stands in the chain of successor liability from Linden-Alimak AB to Industrivarden, the Court will not again refer to Alimak AB. Instead, the Court will refer to all the companies in Linden-Alimak AB's chain of successor liability as "Linden-Alimak AB/Industrivarden." Neither Linden-Alimak AB nor any of the companies in its chain of successor liability has ever filed for foreign corporate status in Missouri, had a registered agent in Missouri, employed sales representatives to visit Missouri, or conducted any direct business with Missouri residents.

***3. Linden-Alimak AB's Distributors.***

Prior to 1974, Linden-Alimak AB sold its construction hoists to independent United States distributors. These distributors purchased the elevators in Sweden, imported them into the United States, and then sold them. From approximately 1960 to 1970, Linden-Alimak AB's exclusive distributor in the United States was a company called B.M. Heede, or Heede International, Inc. ("Heede"). Heede was located in Connecticut and sold its products, including Linden-Alimak AB elevators, across the United States. Heede employed sales representatives to cover certain territories, which included Missouri and Kansas City. Heede sold to both end users and companies with which it had

independent distributorship agreements. One of those companies was Remco Rental Machinery Company in Overland Park, Kansas ("Remco").

From 1970 to 1974, Linden-Alimak AB split its distribution arrangement between Heede and Esco. During that time, Esco sold Linden-Alimak AB elevators in thirteen western states and Heede sold Linden-Alimak AB elevators in the rest of the United States, including Missouri. Plaintiffs have not produced any evidence to show that Linden-Alimak AB/Industrivarden's distributors, Esco and Heede, or even its distributors' sub-distributors, like Remco, ever sold Linden-Alimak AB/Industrivarden elevators exclusively or on consignment. Esco and Heede always purchased the elevators in Sweden; all distributors also sold other manufacturer's products.

***4. Linden-Alimak AB's Subsidiaries.***

In 1974, Linden-Alimak AB apparently terminated its relationship with Esco. In addition, Linden-Alimak AB bought a portion of Heede that same year and made Heede its exclusive distributor in the United States. By 1978, Linden-Alimak AB had purchased all of Heede and changed the Heede company name to Linden-Alimak Inc. After Linden-Alimak AB dropped "Linden" and became Alimak AB in 1984, Linden-Alimak Inc. followed suit and changed its name to Alimak Inc. Linden-Alimak Inc. was a wholly owned subsidiary of Linden-Alimak AB; Alimak Inc. was a wholly owned subsidiary of Alimak AB. Both operated, in succession, as Linden-Alimak AB/Industrivarden's sole distributor in the United States.

*Appendix C*

Linden-Alimak Inc. and Alimak Inc. were incorporated in the State of Connecticut. They both operated an office in Connecticut for the distribution and sale of their products, which included Linden-Alimak AB/Industrivarden elevators. Linden-Alimak Inc. and Alimak Inc. both held certificates of authority to conduct business in the State of Missouri. Like Heede did before them, Linden-Alimak Inc. and Alimak Inc. employed sales representatives to cover multi-state territories. These sales representatives sold their companies' products in Missouri. The Clunes' evidence shows that Alimak Inc. sold several Linden-Alimak AB/Industrivarden elevators directly to J.E. Dunn in Missouri during the mid-1980's. After 1988, the activities of Linden-Alimak Inc. and Alimak Inc. are not important, because at that time they became wholly owned subsidiaries of a different Swedish company.

**B. Discussion**

When a defendant challenges a federal court's jurisdiction, the plaintiff bears the burden of proving that jurisdiction exists. *See Moog World Trade Corp. v. Bancomer*, 90 F.3d 1382, 1384 (8th Cir. 1996). If a motion to dismiss for lack of personal jurisdiction is submitted prior to trial on the basis of affidavits and other written materials, as here, then the plaintiff is only required to make a prima facie showing to avoid dismissal.[2] *See Aaron Ferer & Sons Co. v. Diversified*

2. At least one circuit imposes a heavier burden of proof — preponderance of the evidence — when, as here, the parties have been allowed to conduct discovery on the jurisdictional issue. *See Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751

(Cont'd)

*Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977). The plaintiff must show that (1) the defendant is subject to the court's jurisdiction under the state long-arm statute, and (2) the court's exercise of that jurisdiction comports with due process. *See Moog World Trade Corp.*, 90 F.3d at 1384. The Court must resolve all factual disputes in the plaintiff's favor. *See Aaron Ferer & Sons Co.*, 564 F.2d at 1215.

***1. Jurisdiction Under Missouri's Long-Arm Statute.***

As pertinent here, Missouri's long-arm statute confers jurisdiction over "any cause of action arising from . . . (1) [t]he transaction of any business within this state [or] . . . (3) [t]he commission of a tortious act within this state." Mo. Rev. Stat. § 506.500.1. The statute also provides that "[o]nly causes of action arising from [these] acts . . . may be asserted against a defendant in an action in which jurisdiction over him is based upon this section." *Id.* at § 506.500.3. The Missouri Supreme Court has long held that § 506.500 extends the jurisdiction of Missouri courts "over nonresident defendants to the extent permissible under the due process clause of the fourteenth amendment of the [United States]

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(Cont'd)
F.2d 117, 120 (2d Cir. 1984); *Landoil Resources Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1043 (2d Cir. 1990). The Eighth Circuit has also indicated that a heavier burden may be appropriate in such circumstances. *See Block Industries v. DHJ Industries, Inc.*, 495 F.2d 256, 259 n.3 (8th Cir. 1974). The Court was unable to find any controlling precedent applying the preponderance burden, however, and Industrivarden does not argue for it. Accordingly, the Court will only require a prima facie showing from the Clunes.

constitution." *State ex rel. K-Mart Corporation v. Holliger*, 986 S.W.2d 165, 167-68 (Mo. banc 1999) (quoting *State ex rel. Deere & Co. v. Pinnell*, 454 S.W.2d 889, 892 (Mo. banc 1970)). The statutory requirement that limits jurisdiction to causes of action arising from the nonresident defendant's contacts with Missouri codifies the principle of specific jurisdiction. *See Moog World Trade Corp. v. Bancomer*, 90 F.3d 1382, 1384 (8th Cir. 1996); *Scullin Steel Co. v. National Ry. Utilization Corp.*, 676 F.2d 309,312 (8th Cir. 1982); *State ex rel. K-Mart Corporation*, 986 S.W.2d at 168. Both § 506.500 and constitutional principles of due process dictate that unless the nonresident defendant's contacts with Missouri are so significant as to make it subject to the general jurisdiction of Missouri courts, the cause of action on which jurisdiction is based must "arise out of or relate to" the defendant's limited activities in the state. *Id. See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985).

***2. Jurisdiction Under Constitutional Due Process Standards.***

The due process clause of the fourteenth amendment requires that there be minimum contacts between the defendant and the forum state such that the court's exercise of jurisdiction over the defendant does not offend traditional notions of fair play and substantial justice. *See Moog World Trade Corp.*, 90 F.3d at 1384 (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 291, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490 (1980)). "Sufficient contacts exist when 'the defendant's conduct and connection with the forum state are such that [it] should reasonably anticipate being haled into

court there.' " *Moog Word Trade Corp.*, 90 F.3d at 1384 (quoting *World-Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. at 567). In assessing the defendant's reasonable anticipation, the court must find "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.*; *see also Asahi Metal Indus. Co. v. Superior Ct. of Calif.*, 480 U.S. 102, 109, 107 S. Ct. 1026, 1030, 94 L. Ed. 2d 92 (1987).

### *3. Jurisdiction Over Manufacturers Based on Stream of Commerce.*

When jurisdiction over the defendant is predicated upon the defendant's placing its products into the "stream of commerce," the "purposeful availment" requirement ensures that a nonresident defendant will not be haled into a jurisdiction solely because its product ended up in the forum state on an "attenuated, random, or fortuitous" basis. *See Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943, 948 (8th Cir. 1998) (citing *World-Wide Volkswagen*, 444 U.S. at 296-97, 100 S. Ct. at 567, and *Burger King Corp.*, 471 U.S. at 475, 105 S. Ct. at 2183). Thus, "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposely directed toward the forum state." *Asahi Metal Indus. Co.*, 480 U.S. at 112, 107 S. Ct. at 1032. "[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state." *Id.*

Accordingly, to assert jurisdiction over a nonresident defendant based on the stream of commerce theory, a court must find that the defendant engaged in some activity that indicated an "intent or purpose to serve the market in the forum state." *Id.* In *Asahi Metal Indus. Co.*, the Supreme Court provided a non-exclusive list of examples of such activities: "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." 480 U.S. at 112, 107 S. Ct. at 1032.

Similarly, Missouri courts have held that

> the sale or distribution of a product of a manufacturer must arise from the efforts of the manufacturer to serve the market for the product in the forum state and the manufacturer must market and deliver its product into the stream of commerce with the expectation that the products will be sold in the forum state.

*Pohlmann v. Bil-Jax, Inc.*, 954 S.W.2d 371, 373 (Mo. Ct. App. 1997) (citing *Welkener v. Kirkwood Drug Store Co.*, 734 S.W.2d 233, 239 (Mo. Ct. App. 1987)). The Eighth Circuit Court of Appeals has found that manufacturers meet the purposeful availment requirement when they have "poured [their] products into a regional distributor with the expectation that the distributor will penetrate a discrete, multi-State trade area." *Vandelune v. 4B Elevator Components*

*Unlimited*, 148 F.3d 943, 948 (8th Cir. 1998) (citing *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994)).

***4. Jurisdiction Over A Parent Company Based On Activities of the Subsidiary.***

Keeping in mind the manufacturer-distributor relationship and the findings necessary for assertion of jurisdiction over a nonresident manufacturer, the Court must also examine when it is appropriate to assert personal jurisdiction over a nonresident corporate defendant based on the activities of its wholly owned subsidiary. Oddly, the applicable standards for these two situations seem inconsistent. In the case of a parent-subsidiary, courts have held that they cannot exercise personal jurisdiction over the parent corporation based on the activities of its subsidiary merely because the parent owns all of the subsidiary's stock. *See Cannon Manufacturing Company v. Cudahy Packing Company*, 267 U.S. 333, 335-36, 45 S. Ct. 250, 251, 69 L. Ed. 634 (1925); *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980); *Lakota Girl Scout Council, Inc. v. Havey Fund-Rais. Man., Inc.*, 519 F.2d 634, 637 (8th Cir. 1975). Moreover, it is insufficient for a plaintiff to point out normal elements of corporate control by a parent company over its subsidiary to support jurisdiction over the parent. *See United States v. Bliss*, 108 F.R.D. 127, 131 (E.D. Mo. 1985). "The officers of any corporation that owns the stock of another necessarily exercise a considerable degree of control over the subsidiary corporation and the discharge of that supervision alone is not enough to subject the parent to [personal] jurisdiction." *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984).

Thus, a plaintiff must produce something more than mere evidence of the parent-subsidiary relationship to support the assertion of jurisdiction. Courts in the Eighth Circuit have held that they can only assert personal jurisdiction over a foreign parent corporation based on the activities of its resident subsidiary when the parent corporation dominates and controls the subsidiary to the point that the two companies no longer maintain corporate formalities. *See Lakota Girl Scout Council, Inc. v. Havey Fund-Rais. Man., Inc.*, 519 F.2d 634, 637 (8th Cir. 1975) (asserting personal jurisdiction over an individual based on his company's activities because he "dominated and controlled the business and treated it as his own"); *United States v. Bliss*, 108 F.R.D. 127, 131 (E.D. Mo. 1985) ("At least, plaintiff must demonstrate that defendants did not maintain corporate formalities."); *In re North Dakota Personal Injury Asbestos Litigation No. 1*, 737 F. Supp. 1087, 1094-95 (D. N.D. 1990) ("Personal jurisdiction can thus be properly asserted over a corporation if another is acting as its alter ego, even if that alter ego is another corporation."); *Scott v. Mego Intern., Inc.*, 519 F. Supp. 1118, 1125-26 (D.C. Minn. 1981) ("In order for the parent company to subject itself to jurisdiction by virtue of its subsidiary's activities, the companies must be organized and operated so that the one corporation is an instrumentality or adjunct of the other corporation.").

In cases where the subsidiary is acting as distributor for the products of the parent, application of the parent-subsidiary standard appears to be more difficult for a plaintiff than application of the standard used in manufacturer-distributor cases. Compare: When a manufacturer "pours its

products" into a regional distributor (that is an entirely separate company) with the expectation that the distributor will penetrate a multi-State trade area, it has purposefully availed itself of the laws of the states in that area. *Vandelune*, 148 F.3d at 948. If, however, the same manufacturer purchases the regional distributor, making it a wholly owned subsidiary, but maintains a separate corporate existence and does not make the subsidiary its instrumentality, then it has not met the purposeful availment threshold, even if it continued pouring its products into the distribution stream. *U.S. v. Bliss*, 108 F.R.D. at 131. Logic dictates that in cases where a subsidiary/distributor sells the products of its parent/manufacturer, a plaintiff need not establish that they were operating as alter egos. The plaintiff can establish jurisdiction with evidence that suggests the parent/manufacturer intended to serve the market in the forum state and expected that its subsidiary/distributor would penetrate the market of the forum state.

***5. Jurisdiction Over Industrivarden.***

The Clunes contend that the Court can assert jurisdiction over Industrivarden because: (1) Linden-Alimak AB/Industrivarden designed its construction hoists for the United States market by including with those hoists signage and other documentation written in English; (2) Linden-Alimak AB/Industrivarden's distributors and/or wholly owned subsidiaries regularly sent their sales representatives into Missouri; (3) those sales representatives distributed advertising and product information produced by Linden-Alimak AB/Industrivarden; (4) Linden-Alimak AB/Industrivarden occasionally provided technicians from

Sweden to service elevators their distributors sold in the United States; and (5) Linden-Alimak AB/Industrivarden used distributors and/or wholly owned subsidiaries who sold its elevators in Missouri. *See* Plaintiffs' Sugg. in Opp. at 9.

The Clunes' contentions are not supported in factor law. The Court cannot base jurisdiction over Industrivarden in Missouri on the fact that Linden-Alimak AB/Industrivarden directed its activities toward the United States market. Designing a product for the United States market does not constitute an act by which Linden-Alimak AB/Industrivarden can be said to have purposefully availed itself of the privilege of conducting activities in Missouri. Sending Swedish technicians to the United States, without evidence that Linden-Alimak AB/Industrivarden sent any of those technicians to Missouri, does not evince an intent to serve the market in Missouri. The same can be said of Linden-Alimak AB/Industrivarden's actions in sending signage, product information, and other advertising written in English. The Clunes have failed to show, in any of these actions, an intent by Linden-Alimak AB/Industrivarden to direct its products into Missouri, to serve the Missouri market, or to otherwise purposefully avail itself of the privilege of conducting activities within Missouri.

Similarly, the Court cannot accept the Clunes' contention that it should base jurisdiction over Industrivarden on the activities of Linden-Alimak AB/Industrivarden's distributors and subsidiaries. Heede, Esco, Linden-Alimak Inc. and Alimak Inc. were not "regional" distributors with "discrete, multi-state" markets. These distributors and subsidiaries marketed over wide-ranging areas, with the smallest area

being thirteen western states (this area did not even include Missouri). Despite the Clunes' repeated assertions that Linden-Alimak AB/Industrivarden sold its elevators, distributed its materials, and serviced the Missouri market *through* its distributors and subsidiaries, the evidence shows only that Linden-Alimak AB/Industrivarden sold its elevators to its distributors and subsidiaries. The Clunes have not produced any evidence to show that Linden-Alimak AB/ Industrivarden controlled, or had any influence over, its distributors' and subsidiaries' marketing and sales decisions. Similarly, the Clunes failed to produce any evidence showing that Linden-Alimak AB/Industrivarden intended, knew, or even cared whether its distributors and subsidiaries sold its elevators in Missouri. While the Clunes successfully produced evidence to show that Heede, Esco, Linden-Alimak Inc., and Alimak Inc. knew they were selling in Missouri and intended to sell in Missouri, they failed to show that these distributors and subsidiaries were doing so under the expectations of Linden-Alimak AB/Industrivarden.

In short, there is no evidence to suggest that Linden-Alimak AB/Industrivarden exercised any control over its elevators or advertising material once the products began the journey to the United States. *See Guinness Import Company v. Mark VII Distributors, Inc.*, 153 F.3d 607, 615 n. 7 (8th Cir. 1998). Moreover, the Clunes have failed to produce any evidence that Linden-Alimak AB/Industrivarden directed or in any way influenced the distribution and sales decisions of its distributors, even after those distributors became wholly owned subsidiaries. *Id.* Finally, there is no evidence to suggest that Linden-Alimak AB/Industrivarden ever sold its elevators to its distributors and subsidiaries,

who were located halfway across the nation from Missouri (Oregon and Connecticut), with the expectation that its elevators would be sold in the Missouri market. *Cf. Vandelune*, 148 F.3d at 948 (finding that sale of 619 products, within single year, to distributor in neighboring state amounted to purposeful availment); *Barone*, 25 F.3d at 613 (discussing manufacturer's "efforts to reach much of the country through a limited number of [well-placed] regional distributors."). The Court finds that Industrivarden does not have sufficient contacts on which the Court can base jurisdiction. Having discovered the absence of even the most minimum of contacts, there is no need to consider whether exercising such jurisdiction would comport with fair play and substantial justice.

## II. CONCLUSION

Based on the foregoing analysis, it is hereby ORDERED that:

1. The Clunes' motion for an extension of time is GRANTED.

2. The Clunes' and Industrivarden's motions to exceed the page limit in their suggestions in opposition and reply briefs are GRANTED. The Clerk of the Court shall file Plaintiff's Suggestions in Opposition to Defendant's Motion to Dismiss as of September 13, 1999 and Defendant's Reply as of September 16, 1999.

3. The Court DENIES the Clunes' request for leave to file a surreply brief.

*Appendix C*

4. Defendant Industrivarden AB's motion to dismiss for lack of personal jurisdiction is GRANTED.

5. The Clunes' motion to amend their complaint is MOOT.

IT IS SO ORDERED.

s/ Dean Whipple
Dean Whipple
United States District Court

Date OCT 27, 1999

## APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED NOVEMBER 13, 1998

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

No. 98-0179-CV-W-1

CAROL CLUNE,

Plaintiff,

v.

INDUSTRIVARDEN SERVICE AB, et al.,

Defendants.

### ORDER

On July 7, 1998, this Court reserved ruling on Defendant Alimak Elevator Company's motion for summary judgment until such time as Plaintiff gained service on Defendant Industrivarden Service AB through the Hague Convention. Plaintiff has informed the Court that she recently affected service on Defendant Industrivarden Service AB. Plaintiff does not oppose Defendant Alimak Elevator Company's motion for summary judgment. For good cause shown, it is hereby ORDERED that summary judgment be GRANTED in favor of Alimak Elevator Company.

s/ Dean Whipple
Dean Whipple
United States District Court

Date Nov. 13, 1998

**APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 22, 2001**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-1009WMKC

Carol Clune, et al.,

Appellants,

v.

Industrivarden Service AB,

Appellee.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge Beam and Judge Loken would grant the petition.

The petition for rehearing by the panel is also denied.

(5128-010199)

January 22, 2001

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit